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Supreme Court, U.S.
FILED
SEP 30 1997
CLERK

No. 96-1400

In The

# Supreme Court of the United States

October Term, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,

*Petitioners,*

v.

DEEP SEA RESEARCH, INC.,

*Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

## BRIEF OF SALVORS, INC., IOTA, L.P., SEA HUNT, INC., MAREX INTERNATIONAL, INC., ENTERPRISE MARINE SERVICES, INC., THE SINDIA EXPEDITION, INC., THE LADY ELGIN FOUNDATION, COMMERCIAL UNION INSURANCE CO., THE PROFESSIONAL ASSOCIATION OF DIVING INSTRUCTORS, TECHNICAL DIVING INTERNATIONAL, INC., UWATEC, INC., AND DEL NORTE COUNTY HISTORICAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

PETER E. HESS
3 Mill Road
Suite 301
Wilmington, Delaware 19806
ph: (302) 777-1715
*Counsel for Amici Curiae*

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## STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

The parties to this *amicus* brief--companies and organizations such as Salvors, Inc., MAREX International, Inc., the Sindia Expedition, Inc., the lady Elgin Foundation, IOTA, L.P., Sea Hunt, Inc., Enterprise Marine Services, Inc. the California Wreck Divers, and Commercial Union Insurance Co.--are actively engaged, as finders, salvors and/or owners, in the search for and recovery of shipwrecks of historic significance. The Del Norte County Historical Society is working on the preservation of a rich trove of non-precious artifacts recovered from the *BROTHER JONATHAN* and will ultimately curate these objects in its museums in Crescent City, California. The Professional Association of Diving Instructors, Technical Diving International, Inc. and Uwatec, Inc. train and certify and/or manufacture equipment for scuba divers who wish to descend to deepwater shipwrecks like the *BROTHER JONATHAN*. A more detailed description of each *amici* and its own interest in this litigation is set forth in Appendix I to this brief.

Unlike other *amici* to this litigation that profess an academic or philosophical interest in the legal disposition of shipwrecks and their cargoes, the contributors hereto are the persons who have put their own blood, sweat and tears into making the undersea discoveries often coveted by those whose lives have never been at risk while they criticize the finder or his methods.

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[1] Pursuant to Supreme Court Rule 37.6, this brief was entirely written and paid for by *amici* and/or its counsel. Pursuant to Rule 37.3(a), *amici* have obtained the written consent of the parties for permission to file this brief.

*Amici* have frequently invoked the admiralty jurisdiction of the federal courts in order to protect their right to salvage a site; in instances where admiralty's traditional and exclusive jurisdiction over salvage operations has been abrogated by passage of the Abandoned Shipwreck Act, 43 U.S.C. §2101 *et seq.* ("ASA"), some *amici* have been forced to rely--with decidedly inferior results--on alternative remedies such as protracted permitting processes, or the resolution of uniquely maritime legal issues in state courts with little expertise or interest in admiralty law. Unfortunately, other finders--not the parties to this brief--without any guarantee of protection of their right to a say in its disposition--will never even report their discoveries.

Since the earliest codification of admiralty law in the Rhodian Sea Codes of the ancient Phoenician mariners, the right to compensation for the salvage of distressed persons and property from marine peril has been recognized. Schoenbaum, "Admiralty & Maritime Law" 2d ed. §16-1. Admiralty law's inherent flexibility, which has enabled it to evolve to address the changing concerns of millennia of seafarers, has proven similarly adept in guaranteeing that salvors who discover shipwrecks of historic significance are properly motivated to record and protect the archaeological data uncovered during the course of their salvage operations. *Cobb Coin Co., Inc. v. Unidentified, etc. Vessel*, 525 F.Supp 186 (S.D. Fla. 1981) ("*Cobb Coin I*"); 549 F.Supp 540, 549 (S.D. Fla. 1982)("*Cobb Coin II*"); *MDM Salvage v. Unidentified, etc. Vessel*, 631 F.Supp 308, 312 (S.D. Fla. 1986); *Treasure Salvors, Inc. v. Unidentified, etc. Vessel*, 546 F.Supp. 919, 927-28 (S.D. Fla. 1981).

The decisions below have protected the shipwreck while ensuring that the *BROTHER JONATHAN*



is salvaged in an archaeologically sound manner even while a final determination of the ultimate disposition of the artifacts recovered remains pending. *Deep Sea Research v. THE BROTHER JONATHAN*, 883 F.Supp. 1343, 1354 (N.D.Cal. 1995)("*DSR*"). *Amici* submit this brief to urge the Court to affirm the Ninth Circuit Court of Appeals.

**Summary of Argument**

The rights of explorers who find historic shipwrecks have been given great deference by admiralty courts in recognition of their presence on the site and their interest in using legal processes to determine the ownership and salvage rights thereto. Admiralty jurisdiction and the injunction *in rem* gives federal courts the exclusive and immediate ability to protect historic shipwreck sites from the very moment of discovery when they are most vulnerable to interlopers and even if subsequent legal proceedings prove that the wreck is the property of the state. By imposing strict archaeological standards upon the salvage of historic shipwrecks, admiralty law provides powerful incentives guaranteeing the compilation of the vital information that could easily be lost in an unsupervised excavation.

Unless a shipwreck and/or its artifacts are in the actual possession of the state, the Eleventh Amendment does not bar a federal admiralty court from asserting jurisdiction over a wreck site within state territorial waters simply because the state has interposed its own claim of title. The *BROTHER JONATHAN* is not an abandon-ed shipwreck; California may not assert title to her pursuant to preempted state law.

## ARGUMENT

### I. The Rights Of Discoverers And Explorers Are of Broad and Enduring Importance, Particularly in a Maritime Context

*Amici* have a keen interest in the discovery and exploration of shipwrecks like the *BROTHER JONATHAN*. Lying in 260 fsw only 4.5 nautical miles offshore, it typifies the deepwater shipwrecks being found and recovered this decade. In the past several years, divers have located and explored countless wrecks in equivalent and deeper depths as the *BROTHER JONATHAN*: sites previously thought inaccessible to the free-swimming scuba diver.

Perhaps the most famous shipwreck in U.S. history, the legendary Union ironclad, U.S.S. *MONITOR*, lying in 235 fsw off North Carolina's Cape Hatteras, has been visited by privately-funded expeditions each summer since an epic legal battle led by shipwreck historian and expert decompression diver Gary Gentile[2] opened the nation's first National Marine Sanctuary to access by the citizen who own it. *In the Matter of Gentile*, 6 ORW 285C (Dept. of Comm. ALJ 1989). The government's concerted effort to prevent the American public from even visiting the *MONITOR*--coupled with California's antagonism toward DSR--presents a sobering portent for explorers where shipwrecks become bureaucratic property by legislative fiat.

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[2] In the instant litigation, Gentile has been appointed as the district court's independent expert on the diving and salvage of the *BROTHER JONATHAN*, monitoring DSR's activities on the wreck site and reporting directly to District Judge Louis C. Bechtle. Order, June 10, 1996, Docket No. 118, Joint Appendix at 20 (hereinafter, "J.A. at ---").



"Technical" divers--wearing conventional scuba equipment but breathing exotic, non-air gas mixtures--are now routinely descending to world famous shipwrecks like the *ANDREA DORIA* in 240 fsw, the S.S. *REPUBLIC* in 300 fsw, the RMS *LUSITANIA*, in 305 fsw off the Irish coast, and the S.S. *EDMUND FITZGERALD*, in a frigid 560 fsw(!) beneath Lake Superior. *See, Moyer v. ANDREA DORIA*, 836 F.Supp. 1099 (D.N.J. 1993); *Martha's Vineyard Scuba HQ, Inc. v. Unidentified, etc. Vessel*, 833 F.2d 1059, 1061 (1st Cir. 1987);*Bemis v. RMS LUSITANIA*, 884 F.Supp. 1042, 1045 (E.D.Va. 1995). Leading the exploration of this new frontier in maritime history, *amici* have a vital interest in seeing that easily-accessible historic shipwrecks like the *BROTHER JONATHAN* remain open to those who wish to do so lawfully.

This Court's evaluation of the impact of technology on legal doctrine is particularly appropriate within the realm of admiralty law, where the Court has "large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959); U.S. Const., art. III, § 3 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction"). Since the founding of our nation, this Court has been charged with primary authority to develop a federal common law of admiralty, subject to occasional intervention by Congress. Thus, the Court itself sets many of the incentives for maritime exploration in fields of endeavor touched by admiralty law.

In *Foremost Ins. Co. v. Richardson*, U.S. 668 (1982), this Court determined whether the collision of two pleasure boats--neither of which was engaged in maritime commerce--brought the ensuing dispute

within federal admiralty jurisdiction. Justice Powell noted that the issue raised was novel, for "[p]leasure boating is basically a new phenomenon, the product of a [new] technology." *Id.* at 680-81 (Powell, J., dissenting). Facilitated by tremendous advances in search, diving and recovery technology, the discovery of historic shipwrecks presents novel scenarios for the application of traditional admiralty jurisprudence.

That undersea exploration is worthy of national acclaim and encouragement has been explicitly recognized by Congress. It has declared a national policy "to develop, encourage, and maintain a coordinated, comprehensive, and long-range national program in marine science for the benefit of mankind." 33 U.S.C. §1101(a). The objectives of that policy include "encouragement of private investment enterprise in exploration, technological development....and economic utilization of the resources of the marine environment," the "expansion of human knowledge of the marine environment," and cooperation "with other nations....in marine science activities." *Id.* §(b)(2), (3) and (8). Admiralty law more generally reflects many of the same kinds of policies.

## II. Admiralty Law Protects the Rights of Finders and Salvors Through Its Exclusive Injunction *In Rem*

The law of finds and salvage, of ancient vintage in admiralty, give particular cognizance to the rights of the finder and salvor of wrecked property. Schoenbaum, "Admiralty & Maritime Law" 2d Ed. §16-1; *Mason v. THE BLAIREAU* , 6 U.S. (2 Cranch) 240, 265-6 (1804). In large measure, this is simply admiralty's long recognition that the best person to protect a shipwreck is the explorer who has found the site, has the intention of exercising dominion and control over it,



and is before the court to lawfully rescue the property from marine peril. *Eads v. Brazelton*, 22 Ark. 499 (1861); *Rickard v. Pringle*, 293 F.Supp 981 (S.D.N.Y. 1968); *Treasure Salvors, Inc.* v. *Unidentified, etc. Vessel*, 569 F.2d 330 (5th Cir. 1978) (hereinafter, "*Treasure Salvors I*"); *Treasure Salvors, Inc. v. Unidentified, etc. Vessel*, 640 F.2d 560, 571 (5th Cir. 1981) ("*Treasure Salvors III*"); *Hener v. United States*, 525 F.Supp 350 (S.D.N.Y. 1981); *Brady v. S.S. AFRICAN QUEEN*, 179 F.Supp 321 (E.D.Va. 1960).

Whether it is title to abandoned property under the law of finds or a liberal salvage award pursuant to the law of salvage, admiralty law offers significant economic incentive for explorers both to disclose their discoveries to the court and to conduct their recovery operations in an archaeologically sound manner: to come forward and submit their find to the court for resolution of ownership rather than a covert "rape and escape". *Hener, supra.* at 355-58; *Cobb Coin Co., Inc. v. Unidentified, etc. Vessel,* 549 F.Supp. 540, 559 (S.D. Fla. 1982) ("*COBB COIN II*").

It is well-settled that only an admiralty court can exercise maritime jurisdiction *in rem*. *MASON, supra.*; *Houseman v. The Schooner NORTH CAROLINA*, 40 U.S. (15 Pet.) 40, 48 (1841); *THE MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1867); *Madruga v. Superior Court of California*, 346 U.S. 556, 561, 74 S.Ct. 298, 98 L.Ed. 290 (1954); *Treasure Salvors, Inc. v. Unidentified, etc. Vessel*, 621 F.2d 1340, 1346 (5th Cir. 1980) ("Treasure Salvors II"); *O'Neill v. Schoenbrod*, 355 So.2d 440 (Fla. App. 3 Dist. 1978); G.Gilmore & C.Black, The Law of Admiralty §1-13 (2d ed. 1975).

Moreover, only a federal admiralty court can instantaneously assert and project *in rem* jurisdiction

over a shipwreck site within territorial waters and *quasi in rem* jurisdiction over a wreck that lies outside of state waters whose artifacts are salvaged and brought within the district and exercise injunctive powers over these recovery operations. *Moyer, supra.; Columbus-America Discovery Group, Inc. v. Atlantic Mutual Ins. Co., et al.*, 742 F.Supp. 1327, 1333-34; *rev'd on other grounds*, 974 F.2d 450 (4th Cir. 1992)("*CADG I*"); *Treasure Salvors II, supra.; Martha's Vineyard, supra.; MAREX v. Unidentified, etc.Vessel*, 953 F.Supp. 825 (S.D.Ga. 1997). Thus, with the exception of the limited class of shipwrecks purportedly outside of admiralty jurisdiction pursuant to the Abandoned Shipwreck Act, 43 U.S.C. §2201 *et seq.* ("ASA"), the location of a shipwreck does not effect the district court's jurisdiction over the recovery operations.

California state courts have recognized their lack of jurisdiction in this exclusively federal arena: "...with the exception of action to forfeit maritime property used in violation of state law [citations omitted] maritime *in rem* actions must be brought in a federal forum." *Longfellow v. PRESIDENTE MIGUEL ALEMAN* 36 Cal. App. 3d 508, 512, 111 Cal. Rptr. 643 (1974) [dismissing vessel as *in rem* defendant].

The "saving to suitors" clause of the Judiciary Act of 1789, 28 U.S.C. §1333(1), granting federal district courts the exclusive jurisdiction to decide, "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled" confer *in rem* jurisdiction upon state courts. While the clause allows a state court to provide traditional common law remedies for maritime causes of action brought in a state forum, *Madruga, supra.* at 560-61, neither the arrest or injunction *in rem* nor the salvage award is a common law remedy: the



Supremacy Clause of the Constitution, Art. VI, Cl.2, prohibits any state court from exercising jurisdiction *in rem*. *THE HINE v. Trevor*, 71 U.S (4 Wall.) 555 (1866); *THE MOSES TAYLOR, supra.; Metropolitan Dade Co. v. One Bronze Cannon*, 537 F.Supp. 923 (S.D.Fla. 1982). Thus, it is well-settled--and specifically recognized by California courts--that a state forum hearing a maritime case is *not* automatically converted into an admiralty court. *Longfellow, supra.* at 513.

The Petitioners and their *amici* suggest that pursuant to this Court's reasoning in *Couer d'Alene Tribe v. Idaho*, ---U.S.---, 117 S.Ct. 2028 (1997), a quiet title action in California courts would afford DSR an adequate remedy under state law without implicating the Eleventh Amendment immunity of the State. In fact, an examination of California law demonstrates that even this alternative relief is unavailable to resolve the instant dispute over title and salvage rights to the *BROTHER JONATHAN* Two provisions of the California Code of Civil Procedure, §760.020(a) and §762.090(a), authorize quiet title actions against the State. Yet §762.090(b) specifies that "[T]his section does not constitute a change in, but is declaratory of, existing law.", including the constitutional tenet reaffirmed in *Longfellow, supra.* More importantly, the California Public Resources Code, Chapter 7, §6461, limits the location within which a quiet title action is authorized against the State to "the former bed of a navigable river or stream"--that is, riparian property. Conspicuously absent, however, is statutory authorization of any quiet title action to *littoral*, or oceanic property, such as the shipwreck of the *BROTHER JONATHAN.*

Under the majority's reasoning in *Coeur d'Alene*, an Idaho state court action could afford the Indian tribe

identical relief as had been sought in federal court, thereby obviating the fatal Eleventh Amendment problem. 117 S.Ct. at 2035-6 (Kennedy, J.). The same rationale obviously is not true in the case at bar, where the remedies sought are unique to admiralty. Thus, with no adequate remedy at State law, no California forum can resolve the instant dispute over title and salvage rights to the *BROTHER JONATHAN*. The Ninth Circuit therefor correctly ruled that this case must initially be heard in federal court.

### III. Admiralty Jurisdiction Over a Newly-Discovered Shipwreck is Essential if the Site is to be Protected When Most Vulnerable

Immediately upon its discovery, the explorers who found the shipwreck of the *BROTHER JONATHAN* faced the dilemma of how to protect their much sought-after find. As noted above, an historic shipwreck in 260 fsw located only 4.5 nautical miles offshore presents a tempting and readily-accessible target for today's technical divers. But admiralty's injunction *in rem* , good against all the world, has long been a powerful and effective tool to prevent interlopers from encroaching on a newly-discovered sites when such shipwrecks are at their most vulnerable: the very moment of discovery.

The siren song of treasure wrecks like the *BROTHER JONATHAN* is perhaps the reason why such sites are so extraordinarily vulnerable to plunderers. The corruptive lure of a major historical find is disturbingly illustrated in *Treasure Salvors v. Jordan*, 556 F.Supp 1319 (S.D. Fla. 1983). Bobby Jordan, a vessel captain who had known and worked closely with Treasure Salvors for a decade and a half, was under



contract to them when his vessel recovered significant valuable artifacts from the Spanish galleon, *SANTA MARGARITA*,. Yet while diving at a location pinpointed with his principal's confidential archival research and on-site search and recovery data, and while using their fuel, groceries, equipment and crew, Jordan nevertheless abruptly absconded with the treasure his vessel had recovered--in the process kidnapping two Treasure Salvors employees--and unsuccessfully attempted to assert an independent claim of salvage rights.

The admiralty court's inherent injunctive powers swiftly quashed Jordan's competing claim, recovered all of the stolen treasure and permanently precluded him from benefiting from his misdeeds. Moreover, the admiralty court's Order, good against the world, protected the *SANTA MARGARITA* from further depredations by anyone else, thereby ensuring its archaeological recovery by the salvors whose exhaustive historical research and equally comprehensive underwater archaeology had located the scattered remnants of the long-lost galleon, the richest shipwreck that then had ever been found.*Id.*

The *SANTA MARGARITA*"s artifacts were discovered in a long corridor nearly a mile in length, beneath the contiguous zone just seaward of Florida's territorial seas. *Id.* at 1331-33. Yet had the shipwreck been scattered only several hundred yards closer to shore, under the reading of the ASA that the State of California urges, the admiralty court would have been deprived of jurisdiction over at least a portion of the galleon wrecksite, thereby depriving the admiralty court of its injunctive powers to protect the archaeological integrity of the site. The court noted,

> [T]he task of locating ancient shipwrecks, especially those such as the *MARGARITA* whose treasures and artifacts have been widely scattered by shifting currents and storms over the years precludes absolute precision in establishing exact coordinates which contain the wreckage. *Id.* at 1337.

Indeed, as a rule, wooden shipwrecks of ancient vintage lost in shallow waters near state seaward boundaries are generally found in extremely large debris fields: the natural processes over the centuries that scatter the remains of a sunken vessel show no respect for the modern niceties of states' territorial seas. *See, Treasure Salvors v. Unidentified, etc. Vessel,* 546 F.Supp. 919, 922-30 (S.D. Fla. 1981) [Spanish galleon *ATOCHA* scattered across 13.3 miles of seafloor];*Cobb Coin I, supra.* at 194; *Cobb Coin II, supra.* at 558-61; *Zych v. THE LADY ELGIN,* 755 F.Supp 213, 215 (N.D. Ill. 1991), *rev'd on other grounds* , 960 F.2d 665 (7th Cir. 1992), *cert. den.* 113 S. Ct. 491 (1992); *Fairport Int'l. Exploration, Inc. v. THE CAPTAIN LAWRENCE,* 913 F.Supp. 552, 556 (W.D.Mich. 1995); *aff'd,* 105 F.3d 1078 (6th Cir. 1997).

In fact, shipwrecks of historic and archaeological significance are often discovered by sheer happenstance. The Spanish frigate *CAZADOR* was laden with a shipment of silver coin en route from Vera Cruz to its economically-strapped colony, New Orleans--then only a muddy backwater on the lower Mississippi--when it disappeared in the Gulf of Mexico in 1784. In 1993, the F/V *MISTAKE,,* bottom trawling in 300 fsw off Alabama, mistakenly snagged an obstruction, hauling up its tattered nets only to be astonished by the torrent of silver reales falling to the deck. Only the prompt issuance of an admiralty injunction protected the historic shipwreck from interlopers while the commercial fishermen who found her had an opportunity to mobilize the archaeological expedition that dived to, assessed, mapped and recovered the long-lost *CAZADOR. Grumpy Partnership v. Unidentified, etc. Wreck,* ---F.Supp.---, C.A. No. 93-2621 (E.D. LA).



Although in the case at bar, the precise location of the *BROTHER JONATHAN* beneath California waters remains under seal, the site of its sinking extends several nautical miles from Jonathan Rock, upon which its wrecking is historically attributed, to the site where its primary cultural deposit--the lower hull structure and its associated artifacts--was ultimately discovered by DSR. *DSR, supra.* at 1347. Had the sinking ship drifted further seaward and outside of the state's territorial seas, the admiralty court's jurisdiction could never have been challenged. But for the protection of the finder's rights and the archaeological integrity of a shipwreck to rest solely on the vagaries of the current that carried it while foundering or the sturdiness of its hull while sinking flies in the face of centuries of admiralty jurisprudence which has consistently sought to promote maritime uniformity and predictability. *Southern Pacific Co. v. Jensen,* 244 U.S. 204, 215-16 (1917); *American Dredge v. Miller,* ---U.S.---; 114 S.Ct.981 (1994).

Consider one of the most common causes of shipwreck: collision. Vessels are most likely to collide when they are forced to navigate in close proximity to each other, such as when traveling up and down a river. Major rivers--historic highways of commerce so vital to the evolution of U.S. admiralty law--often demark the boundaries of adjacent states, where the border is the *Thalweg,* or midpoint in the main navigational

channel. *New Jersey v. Delaware*, 291 U.S. 361, 379 (1934). A wooden hulled vessel, the victim of collision, is likely to be found scattered across two jurisdictions by decades of current, dredging or anchoring. Yet under the reading of the ASA promoted by the Petitioner, not only is the admiralty court powerless to immediately assert jurisdiction *in rem* to enjoin salvage of the shipwreck site upon its discovery, neither adjacent state may issue a permit for the recovery of the entire vessel, either!

The admiralty court was called upon to address an analogous situation in *Hener, supra.* The rights of three rival searchers for a lost cargo of silver in the Arthur Kill, dividing New Jersey from New York, were all adjudicated in a single forum that could prevent any violent confrontations on the water. As the actual location of the silver was unknown, neither state could issue a search permit for operations partially outside of its territorial waters. Nevertheless, the court recognized the states' concurrent environmental jurisdiction as well as the U.S. Coast Guard's authority over navigational issues. *Id.* at 359-64. Denying an admiralty court the jurisdiction that it and it alone possesses to protect a shipwreck site while its ownership is determined virtually ensures the loss of vital archaeological information that would otherwise be recorded by a conscientious salvor: it is very nearly an invitation for maritime confrontation and anarchy that the law of salvage has evolved to prevent. *Id.* at 358. Admiralty law encourages openness and the resolution of conflicting claims by legal process; the federal forum alone has the tools to ensure that this is done.



## IV. Admiralty Law Fully Protects the Archaeological Integrity of Historic Shipwrecks

Petitioners make much of the assertion that admiralty courts are incompetent to impose archaeological standards upon the finders and salvors of historic shipwrecks. Quoting the Senate sponsor of the ASA, Bill Bradley of New Jersey, California and its *amici* claim that

> [T]here is no federal law requiring orderly and archaeologically correct excavation when salvage does take place...Under the current system, federal courts--sitting in admiralty--have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks.[3]
> Pet. Br. at 7-8.

Apparently, neither Senator Bradley nor the State of California has ever bothered to read the caselaw they are so critical of. In fact, Petitioners' assertion is precisely wrong: admiralty law has uniformly stood as a staunch proponent of quality archaeological recordation of historic wreck sites:

> [T]his Court now holds that in order to *state a claim* for salvage award on an ancient vessel of historical and archaeological significance, it is an essential element that the salvors document to the Admiralty Court's satisfaction that it has preserved the archaeological provenance

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[3] Ironically, a decade after passage of the ASA, Senator Bradley's home state of New Jersey has yet to enact *any* shipwreck legislation!

of a shipwreck. *Cobb Coin II, supra.* at 559. [Emphasis supplied]

In denying rival salvors the exclusive right to search for and recover the purported scattered wreck site of a Spanish galleon, the admiralty court noted that neither party had conducted independent historical research into the shipwreck, nor made any *bona fide* effort to preserve its archaeological integrity:

> [A]rchaeological preservation, on-site photography, and the marking of sites are particularly important in the instant context, as the public interest is compelling in circumstances where a treasure ship, constituting a window in time, provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.
> *MDM Salvage, Inc. v. Unidentified, etc. Vessel,* 631 F.Supp. 308, 310 (S.D.Fla. 1986).

These considerations are further support for the lower courts' insistence that the *BROTHER JONATHAN* be treated as a unified *res*. The appellate court found that it defies judicial economy, Congressional intent and common sense to divide the salvage rights between the abandoned and unabandoned portions of the shipwreck, or among the portion of a scattered site lying across state and international waters. *DSR*, 102 F.3d 379, 389 (9th Cir. 1996). But when dealing with an historic shipwreck, the archaeological implications of such an unwieldy arrangement are of equal importance:



> ...to allow competing salvors to criss-cross their own paths through the wreck site area could result in substantial disturbance of the historical and archaeological capabilities by preventing chronological, comprehensive mapping, studying, preserving through photographs and otherwise, the full value of the corridor. This would diminish the capabilities of the archaeologists to recreate with authenticity the full spectrum of life, represented by the wrecks and the wreck sites in the early 17th century. *Treasure Salvors,* 546 F.Supp. at 928.

Perhaps the most uniform findings to emerge from the recent historic shipwreck salvage jurisprudence has been the emphasis that admiralty courts have placed on archaeology, thereby ensuring that it goes hand in hand with the recovery of historic vessels. In enjoining rival salvors from encroachment on the site of the fabled galleon, *ATOCHA*, District Judge Sidney Aronovitz meticulously described the finders' laudable archaeological efforts that gave rise to the injunction. *See, Treasure Salvors,* 546 F.Supp. at 922-31. Similarly, under the law of salvage, both the district and appellate courts noted with approval the extraordinary care taken by the Columbus-America Discovery Group to record, recover, preserve and study the artifacts found with the golden horde of the California gold rush paddle steamer, S.S. *Central America. CADG v. Unidentifeid, etc. Vessel,* 1989 AMC 1955, 1958-59 (E.D.Va. 1989);*CADG I, supra.* at 468; *CADG II,* 56 F.3d 556, 573 (4th Cir. 1995). *See also, MAREX, supra.* at 829.

*Amici* the National Trust for Historic Preservation, *et al.* point to *Moyer, supra.*, as evidence that

salvors working under admiralty jurisdiction are not held to professional archaeological standards. *Amicus* Br. at 5. This characterization misrepresents the court's conclusions with regard to the salvage of the Italian luxury liner *ANDREA DORIA* Concluding that the *DORIA* was of modern vintage, had been extensively documented while afloat and had sunk intact, the admiralty court found relatively little archaeological significance to the shipwreck.*Id*, at 1107. Notwithstanding the lack of any obligation to do so, the court commended the salvor's substantial historical research into the vessel and investment in his salvage operation, extensively documented on film and video. *Id.*

The salvage of the *BROTHER JONATHAN* is no exception. Judge Bechtle has taken exacting measures to ensure the protection of the archaeological data compiled during her excavation. Pet. App. A53-54; Op. Cert. App. 11a; *DSR , Slip op,.* at 11-18 (July 13, 1995), Docket No. 95. Nautical archaeologist Robert Reedy, Jr., who is documenting the site and its rich trove of artifacts, both precious and mundane, and world-renowned oceanographer/historian Willard Bascom, are working closely with Respondent DSR to ensure that the valuable legacy of the *BROTHER JONATHAN* and its contemporary salvage are preserved for the benefit of the public at large. *Amici* the Del Norte County Historical Society, working under the supervision of maritime artifact conservator Herbert Bump, is operating a laboratory in Crescent City where hundreds of shipboard items are undergoing lengthy and complex preservation treatment prior to their eventual curation at the Society's museum. Cognizant of the *BROTHER JONATHAN*'s importance to California history, Judge Bechtle appointed Gary Gentile--an acclaimed shipwreck explorer, photo-



grapher, historian and author with extensive diving experience on similar deepwater wrecks--as the court's official observer of the salvage operations. J.A. at 20.

Rather than endangering or permitting the destruction of an historic shipwreck, as Petitioners and their *amici* so stridently and frequently accuse, the exercise of admiralty jurisdiction over the salvage of the *BROTHER JONATHAN* has done just the opposite: "[T]hus, there can be no suggestion that federal admiralty procedures sanction salvaging methods which fail to safeguard items and the invaluable archaeological information associated with the artifacts salved." *Cobb Coin I, supra.* at 208.

## V. The Eleventh Amendment Does Not Bar This Action

*Amici* endorse and commend the Solicitor General for the reevaluation of the U.S. position as to the Eleventh Amendment immunity of the State of California to these proceedings. U.S. Br. in Support of Petitioner, at 32, fn. 23. The Eleventh Amendment--an affirmative defense that must be proven by the party asserting it--does not specifically mention or immunize a state from the reach of an admiralty decree *in rem*. *United States v. Peters*, 9 U.S. (5 Cranch.) 115, 139 (1809) Historically, this Court never held it as a jurisdictional bar thereto: particularly when, as here, the property at issue was not in the actual possession of the state. *THE DAVIS*, 77 U.S. (10 Wall.) 15 (1869) [federal immunity]; *See generally*, Bederman, "Admiralty and the Eleventh Amendment" 72 Notre Dame L.Rev. 935, 960-78 (1997). Actual possession is not even remotely at issue herein: California does not even know the *location* of the *BROTHER JONATHAN*-! *DSR*, 883 F.Supp. at 1364.

As noted in some detail by the United States, the twin cases of *In Re New York*, 256 U.S. 490, 256 U.S. 503 (1921) are inapposite to the instant litigation: in each instance, the vessel over which the admiralty court sought to exercise *in rem* jurisdiction was a state-owned ferry employed in governmental service, precisely the "raid on the state treasury" that the Eleventh Amendment was designed to preclude. A salvage award paid out of the proceeds of a shipwreck that the state never owned nor possessed, on the other hand, is an entirely different and distinct matter. *See*, Owen, "Some Legal Troubles With Treasure: Jurisdiction and Salvage" 16 J. Mar L. & Comm. 139, 170 (1985).

By the same token, this Court's decision in *Florida Dept. of State v. Treasure Salvors, Inc..*, 458 U.S. 670 (1982) entailed the ownership of shipwrecked property held by state officials *ultra vires*, but nonetheless in their actual possession. The Court's cautionary language as to the reach of the Eleventh Amendment *Id.* at 697, does not apply to instances where, as here, the State has neither actual possession, nor has taken any measure whatso-ever to perfect a claim of title to the shipwreck it might have otherwise asserted under the ASA. A mere declaration of ownership by the State, with nothing more, will not trigger the Eleventh Amendment's jurisdictional bar. *Cobb Coin II, supra.* at 551 fn.10. The action *in rem* against a shipwreck claimed by a state "...is not an action against the state but merely *against the property*."*Sindia Expedition, Inc. v. THE SINDIA* , 895 F.2d 116, 120 (3d Cir. 1990).

The inquiry made by admiralty court as to the ownership of the *BROTHER JONATHAN* is nothing more than an exercise of its jurisdiction to determine its



own jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947). The court may take jurisdiction to determine the initial issue of the abandonment of a shipwreck, as under the ASA, this inquiry determines whether the statute deprives the court of jurisdiction. *Zych v. THE SEABIRD*, 811 F. Supp. 1300, 1312 fn.9 (N.D. Ill 1992).

While the court resolves this initial inquiry, the wreck site can be safeguarded by an injunction *in rem* and the interest of the finder/salvor protected. Should it be determined that, as here, the shipwreck is not covered by the ASA, the adjudication of the salvage award can be resolved in its entirety in admiralty, with the district court retaining jurisdiction to "...determine the manner in which the wreck and its cargo, or the proceeds therefrom, should be distributed." *DSR, supra.* at 1364.

If the district court determines that the shipwreck has been abandoned, then pursuant to the ASA, any litigation over possessory rights to the wreck must take place in state court. But while this initial jurisdictional inquiry is being made, and the treasure-laden *BROTHER JONATHAN* is at its most vulnerable, the state will also be assured that the time-honored powers of the admiralty court will have protected its own interest in the shipwreck and its artifacts. *Id* . at 1354.

## VI. The *BROTHER JONATHAN* is Not an Abandoned Shipwreck

The ASA gives states title to a limited class of *abandoned* shipwrecks in their waters: those which are embedded in the seafloor or eligible for inclusion in the National Register of Historic Places. 43 U.S.C. §2205(a).

Congress intended the determination of abandonment to follow traditional admiralty jurisprudence. H.R. Rep. 100-514 (II) at 8, *reprinted in* 1988 U.S.C.C.A.N. at 377.

In support of its contention that the *BROTHER JONATHAN* has been abandoned, California cites numerous cases in which abandonment was never at issue. For example, in *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989), the *in rem* defendant shipwrecks were indisputably "wrecked *and abandoned* " Spanish galleons. Similarly, in *Chance v. Certian Artifacts Found and Salvaged* , 606 F.Supp. 801 (S.D.Ga. 1984) and *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), there was no question that if the finder prevailed over the landowner, the law of finds would apply.

Petitioners and their *amici* contend that under the test of abandonment adopted below, it will be difficult for any shipwreck to be deemed abandoned. Admiralty precedent in which the issue of abandonment was actually litigated demonstrates that this is clearly not true: this case presents the Court with an opportunity to clarify any remaining uncertainty by propounding an universal definition of abandonment.

In making this determination with respect to shipwrecks, admiralty courts have generally deemed dispositive the owner's capacity to locate and salvage their property. Thus, in *CADG I, supra.* at 467-68, the Fourth Circuit ruled that the insured shipments of gold on board the *S.S. CENTRAL AMERICA*---lost in an 1857 hurricane in 8,500 fsw 180 miles off South Carolina--could never have been abandoned by the insurers who had unwritten the catastrophic loss: the technology to



find--much less recover--the insured shipments of gold from the abyssal depths at which it lay had never existed until the present decade.

The LADY *ELGIN*, a wooden-hulled sidewheel paddle steamer contemporary to the *BROTHER JONATHAN*, broke apart after an 1860 collision, leaving her remains strewn for miles across the bottom of Lake Michigan. The much sought-after shipwreck--the greatest maritime disaster ever on this nation's "Inland Seas"--eluded numerous prominent explorers until 1989, when, only after many years archival research and months spent criss-crossing the lake with sonar, professional salvor Harry Zych of Chicago located the *LADY ELGIN*'s debris field. Zych established the Lady Elgin Foundation, which obtained the salvage rights to the shipwreck from the CIGNA Insurance Co., the successor to the original underwriter, the Aetna Marine Insurance Co. The admiralty court found that there had been no abandonment of the sunken sidewheel steamer over the intervening century and a third:

> . . . because the technology has not previously been available to locate the wreck . . . the court finds that Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success. *Zych v. The LADY ELGIN*, 755 F. Supp. at 216[4]

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[4] This case, affirmed in part and reversed in part on other grounds, 960 F.2d 665 (7th Cir 1992), was relitigated in the Cook County Circuit Court and specifically affirmed on these grounds. *People. Zych, et. al.* No. 92 CH 8493 Hon. Margaret McBride, May 13, 1996. (Bench ruling appended hereto as Appendix II).

This is not to say, as the Petitioner seems to suggest, that a marine underwriter can never involuntarily abandon a shipwreck that it has insured. A century later, on July 26, 1956, another catastrophic collision claimed the beautiful Italian luxury liner *ANDREA DORIA*, The *DORIA*'s death throes witnessed by the world's media, the wreck visited the very next day by intrepid scuba divers, and the site of open and notorious salvage operations ever since, in 1993, the *DORIA* was found by the admiralty court to have been clearly abandoned by its owner, an Italian insurance consortium. With the *DORIA* at a known and accessible location, and readily available technology with which to salvage the wreck, the underwriter had made no effort of its own to recover the sunken luxury liner, had not engaged in any meaningful negotiations with any other salvor, nor filed any claim of title to the property openly salvaged from her, thereby clearly demonstrating its intention to abandon the shipwreck.*Moyer, supra.*

After holding a jurisdictional hearing on abandonment between the salvor and the State of Michigans --identical to the *BROTHER JONATHAN* hearing below that the loser, California, now finds so objectionable--both the appellate and district court found that the 1933 shipwreck of the *CAPTAIN LAWRENCE* had been abandoned by its owner, a commercial salvor who

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5 Ironically, the State of Michigan, which readily agreed in *Fairport* that the admiralty court had the jurisdiction to determine its jurisdiction by ruling on the abandonment of the shipwreck, participating in the hearing and prevailing, now asserts as an *amici* that these jurisdictional inquiries are barred by the Eleventh Amendment! *See*, Florida, *at al. amici* brief at pp. 5-10.



had survived his vessel's destruction on the rocky shores of Lake Michigan's Poverty Island. The owner, who possessed both the capacity to recover the shipwreck and the specific knowledge of its location in relatively shallow depths, had made no effort to salvage her. Hence, the *CAPTAIN LAWRENCE*, abandoned shortly after her sinking, passed to Michigan pursuant to the ASA, thereby depriving the admiralty court of further jurisdiction. *Fairport International Exploration, Inc. v. The CAPTAIN LAWRENCE*, 913 F.Supp. 552 (W.D. MI 1995); *aff'd*, 105 F.3d 1078 (6th Cir. 1997).

From this caselaw, a universal definition of abandonment can be distilled for this Court to pronounce, thereby providing guidance in the future litigation that will inevitably ensue as other historic shipwrecks are discovered. Admiralty courts have uniformly ruled that where the owner of shipwrecked property has the capacity to recover it from a known location, yet does not do so within a reasonable amount of time, that property will be deemed to have been abandoned.

Applying this test to the *BROTHER JONATHAN*, demonstrates that it has not been abandoned. The shipwreck eluded discovery despite 20 concerted years' effort to locate it; it was found several miles from her purported place of sinking in deep water only very recently accessible by divers. Upon the commencement of these proceedings, her owners by subrogation immediately interposed their claim of title through their exclusive salvage contract with DSR, thereby making

manifest their intention to retain ownership of their property. J.A. at 148-55.

## VII. California Law That Conflicts With the ASA is Preempted

There is no question that California Pubic Resources Code §6313 conflicts with the ASA in that it asserts title to *all* abandoned shipwrecks, irrespective of their embeddedness or National Register eligibility. Moreover, pursuant to §6313, abandonment presumptively occurs merely 50 years after a vessel sinks. The ASA, on the other hand, quitclaims ownership of certain shipwrecks beneath the territorial seas to the states through an initial federal assertion of title thereto. This is consistent with the rule set forth in *United States v; California*, 332 U.S. 19, 36 (1947): the United States is the paramount sovereign in the resources of the territorial seas. By the plain language of the ASA, any shipwrecks not so quitclaimed remain subject to admiralty law. 43 U.S.C. §2106(b).

Congress addressed what it percieved as confusion over states' ownership and managerial rights to shipwrecks in their waters by enacting the ASA. 1988 U.S.C.C.A.N. at 366. Clarity and uniformity were introduced by the federal quitclaim of a limited class of shipwrecks to each state. Were the California statute not preempted by the ASA, a welter of conflicting state laws would exist; the confusion that the federal legislation sought to preclude would instead be compounded.

*Panama Ry. Co.v. Johnson*, 264 U.S. 375 (1924) sets time-honored limitations upon federal maritime legislation: traditional subject matter cannot be excluded from admiralty jurisdiction, nor may it render admiralty law non-uniform. *Id.* at 386-87. Were §6313 not preempted by the ASA, insofar as it makes salvage law non-uniform, California will have been unconstitutionally delegated substantive maritime law-making power. While Congress may permissibly alter admiralty law, it may not delegate maritime law-making power to the states so that a core subject of admiralty is rendered non-uniform. *Knickebocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920). Of course, it is well-settled that salvage law has long been deemed a core subject of admiralty. *Mason, supra.; Houseman, supra.*

*Jensen, supra.* at 216 made it manifest that any state legislation which worked ..."material prejudice to a characteristic feature of the general maritime law" or interfered with its uniformity, was invalid. *Jensen*'s continuing vitality was recently reaffirmed in *American Dredgeing Co., supra.* at 985: federal maritime law will preempt contrary state law where a rule originates or is exclusively applied in admiralty or is so outcome-determinative that the conflicting state legislation would upset the proper harmony of maritime law.

Both the salvage award and the injunction *in rem* are characteristic features of admiralty that originated and are exclusive to federal admiralty jurisdiction. *Houseman, supra.* The application of California's §6313, giving the State title to the *BROTHER JONATHAN* despite its clear exclusion from the ASA, would render the ASA unconstitutional. Accordingly, both the district and appellate courts correctly ruled that §6313 was preempted by the ASA and cannot serve as a lawful basis for the state's claim of title to the shipwreck.





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## VIII. Assuming, *Arguendo*, that the *BROTHER JONATHAN* was Abandoned, it is the Property of DSR Pursuant to the Law of Finds

As noted above, the ASA asserts federal title to a limited class of abandoned shipwrecks and transfers them to the states. 43 U.S.C. §2105. Assuming, *arguendo* , that the *BROTHER JONATHAN* was abandoned at some point during the past century and a third, under the terms of the ASA, it is now exclusively the property of its finders, DSR.

The ASA explicitly states that admiralty law continues to apply to those shipwreck outside of the limited class which the federal government has quitclaimed to the states. 42 U.S.C. §2106(b). Congress made it clear that in enacting the ASA, its intent was to:

> "...carve out a limited exception from general admiralty principles for those classes of shipwrecks to which this Act applies. All other shipwrecks remain subject to the uniform principles of admiralty law....
> 1988 U.S.C.C.A.N. at 377.

That the *BROTHER JONATHAN* is not embedded in the seafloor was not disputed before the Ninth Circuit by California; it now constitutes the law of this case. *DSR, supra.*, 883 F.Supp. at 1354-5o. Petitioner's belated attempt to declare the shipwreck eligible for the National Register of Historic Places--akin to locking the



barn door after the animals have escaped--is similarly of no avail as a means of strengthening State's claim of title.

California attempts to excuse its neglect in failing to nominate to the National Register what it now asserts is the most historically significant shipwreck in its waters on the fact that it did not know the location of the *BROTHER JONATHAN*.. Pet Br. at 13-4. The State *still* does not know its location, which remains under seal with the district court *DSR, supra.* at 1364; inexplicably, this has not precluded California from listing the shipwreck as eligible even after the admiralty court had ruled that the *BROTHER JONATHAN* was *not* the property of the State.

The state court judge who independently ruled that the *LADY ELGIN* had never been abandoned by her subrogated owner was scornful of an identical attempt by Illinois to artificially inflate its prospects for a successful claim of title under the ASA through the manipulation of the National Register process. The court refused to give credence to Illinois' brazen registration of the *LADY ELGIN* as its own property: the state had previously signed a consent decree acknowledging the shipwreck to be the property of the Lady Elgin Foundation! *People v. Zych, et al.*, No. 92 CH 8473, Cook Co. Circuit Ct., Chancery Div., Hon Margaret McBride, May 13, 1996, Transcript at pp. 97-8, App. at A11-12. This Court should similarly reject California's transparent, after-the-fact effort to now declare worthy of inclusion on the National Register a shipwreck

whose historic significance it has neglected for at least 20 years.[6] Permitting Petitioner to reap the benefits of the ASA by nominating a shipwreck at some point in time *after* its discovery and the commencement of an admiralty action by the finder--thereby retroactively divesting the finder of his valuable admiralty rights--constitutes a compensible taking under the Fifth Amendment to the United States Constitution.

When, at the time of its discovery and the institution of these admiralty proceedings, the *BROTHER JONATHAN* was neither embedded in the seafloor nor eligible for the National Register of Historic Places--even if abandoned--the shipwreck was *not* transferred to California pursuant to the ASA. 43 U.S.C. §2106(b). Nor can California' preempted §6313 give the state title to the shipwreck. Accordingly, by operation of admiralty's law of finds, abandoned property belongs to its finder. *Hener, supra.* at 354-55.

## IX. Conclusion

For the foregoing reasons, *Amici* urge the Court to affirm the Ninth Circuit Court of Appeals.

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6 The ASA's puported determination that the states are best qualified to manage historic shipwrecks is belied by the neglect of both the *LADY ELGIN* and *BROTHER JONATHAN* . Without dispute, the most significant shipwrecks in either state's waters, neither Illinois nor California took even the most rudimentary measure to perfect their claim of title thereto. Sadly, while the *LADY ELGIN* litigaiton grinds on in Illinois courts, its finder still enjoined from salvage, interlopers have stripped the shipwreck of most of its historic artifacts.



Respectfully submitted,

PETER E. HESS
3 Mill Road
Suite 301
Wilmington,
Delaware 19806
ph: (302) 777-1715
*Counsel for Amici Curiae*

## Appendix I

### Description of *Amici Curiae*

Salvors, Inc. is the successor corporation to Treasure Salvors, Inc., the finders and salvors of the Spanish galleon shipwrecks *ATOCHA* and *SANTA MARGARITA*, which sank in 1622 in international waters near the Florida Keys. Salvors is a sister corporation to Cobb Coin Company, Inc., which, like the Plaintiff/Respondent Deep Sea Research, Inc. ("DSR") continues to salvage various shipwrecks in state territorial waters, in *amici*'s case, the 1715 Spanish Plate Fleet, wrecked off east central Florida's so-called "Treasure Coast".

The effort of Salvors, Inc. and its predecessors in discovering, recovering, preserving and sharing with the public the fabulous treasures and priceless artifacts from long-lost Spanish galleon shipwrecks is literally unparalleled in history. More archaeology has been done on these vessels and more knowledge acquired about American colonial history than from any other sites in the Western Hemisphere; the courage and endurance of Salvors, Inc. President Mel Fisher and his colleagues in the face of governmental avarice, financial hardship adverse weather and is the stuff of contemporary legend. Salvors Inc.'s epic legal battles with the United States, the State of Florida and even modern-day pirate have formed the bedrock of admiralty law in the emerging discipline of historic shipwreck salvage litigation; these decisions are cited repeatedly throughout this brief.

MAREX ("Marine ARchaeology & EXploration") International, Inc. is a Tennessee-based corporation

that has engaged in historic shipwreck search and recovery operations throughout the Caribbean, the Bahamas and off the southeastern U.S. coast. MAREX is presently the plaintiff salvor in two admiralty actions pending in the United States District Court for the Southern District of Georgia in Savannah, which is overseeing the archaeological recovery of two paddle steamer shipwrecks from the early nineteenth century discovered seaward of U.S. territorial waters. *MAREX supra.*.

The Sindia Expedition, Inc. ("S.E., Inc.") and the Lady Elgin Foundation ("Foundation") are private corporations which, like their Florida counterparts, have each engaged in lengthy litigation to secure the salvage rights to shipwrecks of historical significance located in within the territorial seas of the states of New Jersey and Illinois, respectively. *see, Sindia, supra.*; the *Zych* litigation over title and/or exclusive savage rights to the Lake Michigan shipwrecks of the *LADY ELGIN* and *THE SEABIRD* are frequently cited herein.

IOTA L.P., an acronym for the "Institute of the Americas", is a corporation which holds an exclusive permit from the U.S. Common-wealth of the Northern Marianas Islands ("CNMI") for the archaeological recovery of the 1601 Spanish Manila galleon *SANTA MARGARITA*, which wrecked on a coral reef in the territorial seas off the island of Rota. Sea Hunt, Inc. is a New Hampshire corporation engaged in the search for, and recovery of historic shipwrecks under state permit off the Virginia coast. Enterprise Marine Services, Inc. an Alabama corporation, holds an exclusive permit for the archaeological investigation of shipwrecks in the territorial waters of Alabama and has worked on other historic sites in the Gulf of Mexico and adjacent states.



The Del Norte County Historical Society ("DNCHS") is a volunteer organization dedicated to the preservation and study of the history of Del Norte County, California. DNCHS operates two facilities in Crescent City, a maritime museum at the Battery Point Light House and the official repository of the county's historical memorabilia at the former Sheriff's Office and jail, which includes an exhibition on the *BROTHER JONATHAN* disaster. DNCHS has signed a contract with DSR for the conservation, study and long-term curation of unique artifacts recovered from the shipwreck; under the supervision of a professional marine conservator, they are operating a laboratory where artifacts such as portholes, tools, padlocks and keys, cups, pitchers, plates, glassware, what even may be an early football are undergoing a lengthy preservation process prior to their permanent curation in Crescent City. J.A. at 362-67.

Commercial Union Insurance Company is the successor to the California Insurance Company that underwrote a substantial portion of the losses emanating from the *BROTHER JONATHAN* disaster. It has executed a subrogation agreement granting to DSR the right to salvage its property remaining on the *BROTHER JONATHAN.* J.A. at pp. 148-52. Commercial Union has a long history in the marine insurance business and an extensive subrogation practice whose interests will inevitably be affected by the Court's decision in this litigation.

The Professional Association of Diving Instructors ("PADI"), a California corporation, is the largest diving certification and training organization in the world. PADI is responsible for training of more than 70% of the scuba divers in the United States and over

half worldwide, having certified more than 5,000,000 individuals since its founding in 1966. PADI is involved not only in the establishment of safety standards and training protocols for recreational and technical diving, but is also a leader in preserving divers' rights of access to the underwater environment. It has long been an advocate for the responsible use and preservation of underwater resources.

Technical Diving International, Inc. ("TDI") is a scuba diving training and certification agency specializing in technical diving--that is, the use of exotic gas mixtures and redundant equipment configurations to enable the free-swimming scuba diver to descend deeper and explore previously inaccessible shipwrecks like the *BROTHER JONATHAN*. which lies in 260 fsw. Uwatec, Inc., is the U.S. division of an international corporation that manufactures and distributes scuba diving equipment, particularly the specialized gear utilized by technical divers.

The California Wreck Divers are an unincorporated association of experienced scuba divers and historical researchers whose efforts are responsible for the discovery and/or identification of most of the shipwrecks off the California coast. The recovery, preservation and public display of artifacts from these wrecks has been instrumental in educating Californians about their rich maritime heritage. Principles in DSR are long-time California Wreck Divers, whose members, for more than 30 years and at their own expense, have been conducting archival research and in-water searches for the fabled shipwreck of the *BROTHER JONATHAN*.



**Appendix II**

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS ex rel ILLINOIS HISTORIC PRESERVATION AGENCY, et al., | ) | No. 92 CH 8493 Consolidated With 94 CH 5189 |
| Plaintiffs, | ) | |
| -vs- | ) | |
| HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE, and CIGNA PROPERTY & CASUALTY INSURANCE COMPANY, | ) | |
| Defendants. | ) | |

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable MARGARET S. MC BRIDE, one of the Judges of said Court, on May 13, 1996, at the hour of approximately 2 o'clock p.m., at Richard J. Daley Center, Chicago, Illinois.

PRESENT:

MR. RICHARD F. LINDEN,
Special Assistant Attorney General, Appeared on behalf of the Plaintiffs;

MESSRS. PAUL N. KELLER and PETER E. HESS,
Appeared on behalf of the Defendants.

CHRISTINE E. WEBER, CSR
Official Court Reporter
Law/Chancery Division
Circuit Court of Cook County

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* * *

THE COURT: Well, for purposes of this ruling today, I think that there are a few facts that the parties don't contest. One is that this Mr. Hubbard was the owner of the Lady Elgin before it sunk.

[p. 84] Both parties also agree that the records indicate that Mr. Hubbard not only was the owner of the Lady Elgin ship but he was actually an insurance agent for Aetna Insurance Company, the same company that held the policy on his ship, the Lady Elgin.

I also don't think there's any dispute that the sole documents relating to this ownership or the policy, rather, the documents that Aetna has relative to this policy, relate to the six letters that encompass one of the exhibits admitted into evidence in this case by agreement of the parties; and one of those letters indicates the 13th of September letter, 1860, indicates that a letter to Mr. Bennett, "We had $5,000 on the Lady Elgin and $2500 on cargo. The boat belonged to Mr. Hubbard mainly." And that was written by the president of Aetna, E. G. Ripley.

And there were two other letters part of that same exhibit, one dated the 11th of September, which says, "Messrs. Hubbard and Hunt, the telegraph informed us on Saturday of the loss of the Lady Elgin with deplorable



sacrifice of life. Hope we escape any claims on" – question [p. 85] mark – "her cargo." And that's signed by Thomas Alexander, vice-president of Aetna.

And then we have a letter again of the 11th to Captain Dorr, who was, I believe at least agreed to by the parties, was also an agent of Aetna, that said, "The newspapers inform us that the schooner Augusta, which ran into the Lady Elgin, has been liable for 42,000. Do you know whether this has been done at the instance of the owners of the Elgin?" And that's from Thomas Alexander, the vice-president.

There's another letter of the 22nd of September. Then there is the letter – and that September letter says – again, this is to Mr. – Messrs. Hubbard and Hunt. "Gentlemen, yours of the 19th" – perhaps I can't – "is received with sundry papers relating to the claims for Lady Elgin. Mr. G. S. Hubbard, Jr., furnishes us voices of his shipments, as he should. We wish to pay these claims as soon as they are properly approved. Let them be thus prepared and reduced to the cash point and pay them. Yours truly, E. G. Ripley, president."

And then we have the October 10th [p. 86] letter, the portion of which has been the subject of much discussion, that being the line. "Permit us to confirm Captain Dorr's instructions not to accept an abandonment of the vessel for the reason which he informs us he gave you on his recent visit to Chicago."

And then the last correspondence we have is the 15th of November, 1860, "We take notice of the payment of $11,993.20 to G. S. Hubbard in full of policy on Lady

Elgin. The voucher with your November ATC accounts. Yours truly, Thomas A. Alexander."

Now, the State has claimed that by the letter of October 10th the Aetna Insurance Company refused to accept an abandonment and thereafter never acquired any title to the ship; and they further believe that the owner, then Hubbard, abandoned the ship and that thereby the State would take title.

And, in the alternative, they also argue that if Aetna assumed or actually acquired title at a subsequent time, that after they got title they also abandoned any interest in the title by their lack of action for about 135 years [p. 87] and that because, in their position, this ship was abandoned, that under the Abandoned Shipwreck Act that it applies and that, therefore, since it was abandoned and also registered or eligible on the national list of historic places, the National Register, that they are the title.

The defendants claim that there is – well, first of all that the State has failed in their burden of proof, that there was no abandonment by Hubbard – well, that that's one theory – or that there was an abandonment of the initial owner, Mr. Hubbard, to Aetna upon payment of its claim.

They also argue that Aetna took title by way of subrogation upon payment in full on November 15, 1860, and that thereafter Aetna never abandoned its interests or title in this ship; and that, therefore, in 1989 when Mr. Zych found it and subsequently became involved with the Foundation and Aetna, that Aetna, the Foundation and Mr. Zych have title to the ship.



The State suggests that it's burden of proof is by a preponderance of the evidence; and under any theory, whether it be by a [p. 88] preponderance of the evidence or by clear and convincing evidence, I do not find the State has met its burden of proof in this case. They rely on a letter dated October 10th to suggest that the insurance company refused to accept an abandonment by the letter and also by the admission or the request to admit facts on filing this case.

I believe that there are numerous interpretations that could be made from the letter of October 10, 1860. However, there is definitely no letter from Mr. Hubbard abandoning this vessel; and it's important to note that this letter of October 10th occurs prior to the time when an offer of abandonment or a tender of an abandonment would normally be made.

Mr. Simone has testified under oath that an offer of an abandonment would normally come after payment, and then I believe he testified an offer of an abandonment has to come after payment. And Ian Avery also testified that with very few exceptions – and this is again another witness called by the State – the practice was to accept ownership of a vessel upon total loss, although he did agree that upon [p. 89] payment they had the option to refuse an acceptance of an abandonment; but with very few exceptions, the practice was to accept ownership of the vessel upon total loss.

Now, the defense claims that once an abandonment is made as a result of a total payment, they have no right to refuse that abandonment; and the defense cites the Peele case.

But, in any event, it makes certainly more sense that an abandonment wouldn't normally occur until there's some determination that a total loss has occurred. In this case, there's no question that a total loss occurred. Both sides agree with that. And the only indication of when that total loss was determined was when Aetna paid $11,993 upon a claim; and, indeed, the records show that Aetna paid more for the claim than the actual policy.

So, as to the first question of whether or not there was some abandonment by Mr. Hubbard, I don't believe the record shows that on the 10th or prior to that he had tendered an abandonment. But, in addition, I do not find that [p. 90] the State has established that Aetna did not take title on November 15th when they paid this claim in full; and, in fact, I find that Aetna did acquire title, either by way of abandonment upon payment in full or by subrogation.

The record also reflects that the Lady Elgin was struck by another ship, by way of a letter of the 11th of September and also by way of testimony of these various individuals that participated, or at least that testified, rather, at this trial.

So the question then becomes, after Aetna acquired title in 1860, November 15th, did Aetna subsequently abandon this vehicle by its conduct or what the record reflects occurred over the next 135 years.

The State argues that they destroyed documents, that they purposely got rid of their file, that they showed no interest in this because they have no documentation.



However, there is no evidence that Aetna destroyed anything at any time. There's no testimony that Aetna ever intentionally or in any way destroyed any document.

[p. 91] There is testimony that perhaps over time documents were lost or destroyed just by the mere passage of time; but there has been no testimony. No one has suggested that Aetna destroyed any documents. The State asks the court to infer that they've destroyed things over time, from the fact that they have nothing more than the six letters.

The State suggests the six letters really are nothing. However, in my opinion, the six letters that have been held for 135 years not only tell us there was an insurance policy, not only tell us who owned the ship, not only tell us who insured the ship, not only tell us what the policy was for, not only tell us that invoices were submitted and that subsequently the insurance company paid over and above the policy for a total loss.

So, in my opinion, Aetna maintained sufficient documents for 135 years to indicate that they indeed claim title to this ship. I don't see any reason why else they kept these documents. I don't believe it was for some historic reason or for sentimental reasons or [p. 92] whatever you want to call them. They have maintained and kept in their archives six documents that sufficiently describe the transaction between an insured and insurer; and after 135 years, I think that clearly shows an indication to assert ownership rights over this ship.

Then the State proffers that these documents are not enough and that the State – or, rather, that Aetna has abandoned this vessel by its lack of inaction by doing

nothing to search and find the vessel for 135 years. And, again, giving the State the benefit of the burden it claims it should have in this case by a mere preponderance, although all the cases interpreting abandonment do not suggest that it is a simple preponderance to show abandonment, giving them – giving the State this lesser burden, they have still failed to show abandonment by Aetna.

Now, I've read all the cases relied upon by the parties; and I believe that the Brother Jonathan case, the Fairport International case, the Central America case, the Peele case, but the more recent Federal cases interpreting

* * *



[p. 93] this particular Act, and also interpreting maritime salvage law and abandonment, state that the act of abandonment is defined.

Now, we know that the Abandoned Shipwreck Act does not specifically define abandonment. However, cases interpreting it have given their – given the statute some interpretation; and Fairport International and the Brother Jonathan case speak to this notion that abandonment is the act of leaving or deserting such property by those who were in charge of it without hope on their part of recovering it and without the intention of returning to it.

"The Abandoned Shipwreck Act's utilization of the term abandonment is consistent with the traditional interpretation of that term by courts sitting in admiralty, and the legislative history does not evidence a contrary interpretation." This is from the Fairport International versus the shipwrecked vessel known as the Captain Lawrence.

And then in the Brother Jonathan case, it says – again they say, "The Abandoned Shipwreck Act's definition of abandonment [p. 94] generally follows established property law. It is well settled, for instance, that abandonment is the voluntary relinquishment of one's rights to property. Abandonment occurs by an express or implied act of leaving or deserting property without hope of recovering it and without intention of returning to it.

"Additionally, it has long been held the law that when articles are lost at sea, the title of the owner in them remains. Once an article has been lost at sea, lapse of time and nonuser are not sufficient in and of themseives to

constitute an abandonment. In addition, there is no abandonment when one discovers sunken property and then, even after extensive efforts, is unable to locate its owner.

"To show abandonment, a party must prove, one, an intent by the original owners to abandon his property and, two, physical acts carrying that intent into effect. The act of abandonment must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership. Finally, the abandonment must be supported by strong and convincing [p. 95] evidence."

In this case, it was not sufficient that a lapse of time had occurred for a period of years and that there had been no specific attempt to locate the vessel, when the court said that efforts to find it previously would not have been commercially feasible.

Now, the State argues that the evidence has shown a clear intent to abandonment by this lack of documentation. However, I find that the documentation of six letters for 135 years which detailed the relationship between the parties is not a destruction of documents, is not any affirmative act of leaving or deserting the property and, indeed, is to the contrary. It shows an intent to maintain the title of the property which it – it received – if that's the correct word – upon its payment in full of the claim.

And there has been testimony on both sides as to the ability to locate this vessel prior to the late '60's; and most of that testimony has indicated that it would be by way of basically perhaps dropping nets into the area of [p. 96] the loss, by dragging the nets along the bottom floor, and essentially that that would be the way of locating a shipwreck and then having a diver go down for



periods of time to see what had been snagged by either a hook or a net.

However, I think the testimony is certainly much more convincing that until the late '60's, early '70's, the type of equipment such as the side scan sonar, which eventually located this wreck, first made it possible or feasible to really search for this vessel; and although it is criticized that Mr. Zych began his search some 19 years before he found this, he did find it after a long and many hours with equipment that all the experts agree was available after the late '60's, beginning of the '70's, and then when Mr. Zych began to search shortly after that.

So by Aetna not searching for something for this long period of years when it didn't – when the equipment really wasn't available to do it with any kind of ease, cannot be said in this case to amount to an abandonment.

So under either theory, though, I do not find that the State has established [p. 97] abandonment, either by a preponderance, which I don't believe is their burden, or by strong and convincing evidence. I do not believe they have established an abandonment by Aetna.

I also think there is some serious question as to the manner or how this ship became registered on the National Register of Historic Places; and although I don't – I don't believe that Mr. Wheeler in his letters – I believe he fully disclosed to the National Register the condition or the facts surrounding this case.

At the time that the registry was sought, there was a consent decree in place between the parties wherein they were agreeing that title would pass at some future point

to the State upon the doing of certain acts; but at some point, the registry sent a letter back saying – and I don't have it in front of me – but unless the State is the owner, this can't be registered at this time. And then we have a letter with the State saying they believe they were the owner, they are the owner or what have you.

So I believe there's some question as to how this actually did get registered, and [p. 98] there has never been any testimony about how it got registered. The State simply offered an exhibit prepared by Miss Schul certifying that it was registered. But how it became registered, the record is totally void and lacking in any evidence to suggest the process or how it occurred, which I think calls into serious question its registry in the first place.

I think it has some – I think it loses some weight because of the fact that it happened five years after the fact that the ship was discovered. But, in any event, I do not find today that the State has established abandonment.

And in the – I just want to quote against from the Fairport International case, that there is a hesitancy in the law to find abandonment; and, again, although the State says that they have a preponderance of the evidence standard, all of these cases refer to this strong and convincing evidence in regard to abandonment.

The cases say that the law is loathe to find this abandonment without evidence supporting it; and, in addition to the Brother Jonathan case, in Columbus America, the court also [p. 99] held that abandonment of the Central America could not be presumed due to the



inaction because it was not technologically feasible to salvage the vessel until recently.

So I'm going to enter an order today against the plaintiff, the People of the State of Illinois, for failing to establish by way of their burden of proof that they have acquired title to this vessel by abandonment; and I'm going to enter an order allowing title in Aetna, the Foundation and Harry Zych, or CIGNA, if it's – it I misspoke.

So that is the order of the Court today.

MR. LINDEN: Your Honor, may we ask just one point.

I believe parts of this case still remain; and I know there's an injunction in place that prohibits anybody from dissipating assets or any of the artifacts. We'd request that that injunction still be kept in place and not allow any of the defendants to sell or dissipate anything.

There is a chance this case would go [p. 100] on appeal, and just to preserve whatever's here.

THE COURT: Well, I thought the injunction was granted in favor of Mr. Zych against the State.

MR. LINDEN: I believe there's a temporary restraining order and a preliminary injunction that was agreed to be extended that no party in this litigation would dissipate or cause any artifacts to be sold; and I would request your Honor would enter such an order and hold the parties to it. In the event that there is an appeal, I wouldn't want any of the artifacts to be destroyed and destroy the subject matter of any appeal.

THE COURT: Well, first of all, aren't these artifacts currently being held somewhere?

MR. KELLER: Yes, they are.

MR. LINDEN: Mr. Zych has a number of them.

THE COURT: Okay.

All right. Well, I'll have to – I think you should place your motion into writing and see what the position of the defendants is; but I've granted title. And depending on what [p. 101] their position is, you know, I'll have to rule. But right now, I'm not going to rule on anything.

So we'll at least keep whatever order is in effect until further order of Court.

MR. LINDEN: Okay.

THE COURT: All right?

MR. KELLER: Thank you, your Honor.

MR. LINDEN: Thank you, your Honor.

THE COURT: Okay.

MR. KELLER: Your Honor, would you like us to prepare an order at this point, a written order?

THE COURT: Well, however you want to it.

The order would basically read that judgment is entered against the plaintiffs and in favor of the defendants for the reasons stated in open court on the record.

MR. KELLER: Right.

THE COURT: That's really all it needs to say.



MR. KELLER: We would like to have such an order, your Honor.

THE COURT: All right.

[p. 102] (Pause.)

THE COURT: Oh, can I put something further into the record? I do wish to do that. I knew that there was something else that I wanted to say, and now I want to say it.

It doesn't change anything about my ruling; but I do think that under this Deep Sea Research versus the United States – I'm sorry – Deep Sea Research versus the Brother Jonathan, the court in its footnote No. 1 said, "The ASA by its terms applies only to certain abandoned shipwrecks which have been deserted and to which the owner has relinquished ownership rights with no retention. The Act itself does not define the term abandoned. However, according to the regulations promulgated under the ASA, the term abandoned shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person.

"In addition, the regulations specifically exclude from the definition of abandoned shipwrecks vessels upon which insurance [p. 103] claims have been made. When the owner of a sunken vessel is paid the full value of the vessel, such as receiving payment from an insurance underwriter, the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner."

Now, I believe this case at least questions whether or not upon payment in full whether that type of situation would ever apply to the Act. Although I'm not making that finding today, this case certainly suggests it.

Mr. Linden suggested that if that were the case, then anytime an insurance company paid in full, the Abandoned Shipwreck Act would not apply; and then I think the argument would be that in the event that title passed the Act would still apply, and therefore the subsequent inaction of 135 years would amount to abandonment under the Act.

But for my previous reasons that I've already stated, I do not believe that the mere passage of time, that mere nonuse allows the presumption the State is seeking, nor did I find [p. 104] that they destroyed documents or that the lack of documentation amounted to a showing of abandonment.

But I did want to note that this case suggests that this type of scenario might not even come within the Act's purview. However, I'm not going under that assumption. I'm going under the assumption that the State did not acquire title because they did not establish under the Abandoned Shipwreck Act any of the requirements that they are required to meet; one, that it was abandoned and, two, that it was registered, primarily because they didn't show abandonment.

Any I previously directed a finding on the other section because there was absolutely no evidence in this record regarding the wreck being embedded in a coral line formation protected by the state on its submerged



land or the other section that abandoned shipwrecks that are embedded in the submerged land of the State.

So that's all I have to add, all right?

WHICH WERE ALL THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED [p. 105] CAUSE ON MAY 13, 1996.

[p. 106] IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT - CHANCERY DIVISION

I, Christine E. Weber, an Official Court Reporter for the Circuit Court of Cook County, County Department, Chancery Division, do hereby certify that I reported in machine shorthand the proceedings had at the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable MARGARET S. MCBRIDE, Judge of said court.

/s/ Christine E. Weber
Official Court Reporter-
CSR No. 84-1403

Dated this 28th day
of May, 1996.